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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE*
*425 Eye Street NW*
*BCIS, AAO, 20 Mass, 3/F*
*Washington, D.C. 20536*

[redacted]

File: WAC 03 039 50980 Office: California Service Center Date: JUN 12 2003

IN RE: Petitioner: [redacted]
Beneficiari

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a promoter of Mexican musical events that take place at different nightclubs and ballrooms throughout the United States. It desires to employ the beneficiaries as musicians and entertainers for one year. The Department of Labor determined that a temporary certification by the Secretary of Labor could be made. The director determined that the petitioner had not established that the nature of its need for the beneficiaries' services is temporary in nature.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

> an alien...having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

*Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. § 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties that is controlling. *See* 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B).

The petition indicates that the employment is intermittent and that the temporary need is unpredictable. In a letter dated December 16, 2002, the petitioner states that the petitioner's need for the beneficiaries' services is based on a one-time occurrence.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) states that for the nature of the petitioner's need to be a one-time occurrence,

the petitioner must establish that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(4) states that for the nature of the petitioner's need to be an intermittent need, the petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads in pertinent part:

> They will sing in Spanish their latest recording hits and play their musical instruments. They will perform at each dance/show between the hours of 10PM and 2AM. Two sets of 45 minutes each per engagement according to itinerary. . . . They play typical banda tamborazo music.

Upon review, the evidence submitted does not establish that the petitioner's need for the services to be performed can be classified as a one-time occurrence, or an intermittent need. It is the petitioner's business to promote various types of Mexican musical groups and singers throughout various venues in the United States. Therefore, the petitioner has a permanent need to have musicians and entertainers to perform for various Mexican musical events in order for its business to continue to exist. The petitioner has not shown that its need for the beneficiaries' services is temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.